SUPREME COURT, U.S.
Supreme Court, U. S.
FILED
SEP 28 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-494

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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This *amicus curiae* brief of the Association of Motion Picture and Television Producers, Inc. is filed pursuant to Supreme Court Rule 42, with the written consent of all parties, filed concurrently herewith with the Clerk of this Court.

Statement of Interest of Amicus Curiae.

The members of the Association of Motion Picture and Television Producers, Inc. (hereinafter called "Association")[1] are employer parties to the "Standard

[1]When this case arose, the Association's name was Association of Motion Picture Producers, Inc. The present name came about after the merger with an association representing employers in the television industry.

Basic Agreement" with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter called "IATSE") and the collective bargaining agreement with the IATSE and International Photographers of the Motion Picture Industries, Local 659 of the IATSE (hereinafter called "Local 659"). The industry experience roster provisions of these agreements give rise to the basic issue presented by this case (App. 95).

In addition, the members of the Association are parties to numerous other collective bargaining agreements, containing similar industry experience roster provisions, with the IATSE and its local unions and with other labor organizations representing employees in the motion picture and television industry, which are affected by the determinations made in this case. At stake here is, therefore, the interpretation and application of the entire Industry Experience Roster System in the motion picture and television industry in Los Angeles County, California—the cradle and heartland of this industry in the United States.

These vital interests have prompted the Association to file this *amicus curiae* brief in support of the Petition for a Writ of Certiorari. The brief is addressed solely to the second question presented for review.

Amicus curiae will not burden the record with a separate Statement of the Case. Instead, reference to pertinent facts will be made in the argument when appropriate.

ARGUMENT.

REASONS FOR GRANTING THE WRIT AS TO THE SECOND QUESTION PRESENTED FOR REVIEW.

I.

Preliminary Statement.

The second question presented for review is as follows:

> "May the National Labor Relations Board hold that industry seniority employment benefits, in the motion picture industry, obtained under an admittedly otherwise legal collective bargaining agreement, represent illegal encouragement of union membership under the National Labor Relations Act solely because the computation of seniority relates to time worked under such agreement in the face of detailed findings by the Administrative Law Judge, undisturbed by the Board, that employment and employment seniority were not based upon union membership or like considerations." (Pet. 2-3.)

This question clearly meets the considerations outlined in Supreme Court Rule 19 for the grant of *certiorari*. The question presented is an important question concerning the application of the National Labor Relations Act, as amended, and particularly of Section 8(b)(1)(A) (61 Stat. 140, 29 U.S.C. 158(b)) of the Act which vitally affects not only the labor relations of the entire motion picture industry but as well the labor relations of other important industries such as, for instance, the trucking industry.

The decision of the Court of Appeals (App. 113), enforcing the Board's order in this case, is in direct conflict with the decision of the Court of Appeals for

the First Circuit in *N.L.R.B. v. Whiting Milk Corporation*, 342 F. 2d 8 (C.A. 1, 1965), denying enforcement of the Board's order in *Whiting Milk Corporation*, 145 NLRB 1035 (1964), which in turn conflicts with the later decision of the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Teamsters Local No. 480*, 409 F. 2d 610 (C.A. 6, 1969), enforcing, without opinion, the Board's order in *Teamsters' Freight Local No. 480 (Hilton D. Wall)*, 167 NLRB 920 (1967). Additionally, the decision of the Court below is at least conceptually in conflict with the decision of the Court of Appeals for the Third Circuit in *Rosen v. N.L.R.B.*, 455 F. 2d 615 (C.A. 3, 1972).

Alternatively, if the decisions cited above were not to be viewed as conflicting with the decision of the Court of Appeals in the instant case, it follows *a fortiori*, that the question presented is an important one which has not been but should be settled by this Court.

II.

The Importance of the Question Presented Far Transcends the Interests of the Parties to the Dispute.

The determination of the question presented is not only vital to the administration of the industry experience roster system in the motion picture and television industry which, for almost a quarter of a century (App. 23), has provided a highly skilled labor pool for a seasonal and fragmented industry consisting now of some seventy members of the Association and hundreds of emerging and disappearing independent motion picture and television producers (hereinafter called "Independent") (App. 17, 94-95).

The Industry Experience Roster provisions,[2] state that experience shall be credited if it was obtained while working "under a collective bargaining agreement containing the same seniority provisions as those contained herein" (App. 10). These provisions are designed to establish an industry-wide pool of qualified persons in the classifications of the trade who have had comparable work experience (App. 10-11), have passed the same review by a qualifications committee appointed by the Association (App. 24) and have passed the same physical examination (App. 24).

This pool is designed to serve the needs of the entire industry—members of the Association and nonmembers alike. Association members as well as Independents contribute on the same hourly basis to the Contract Services Administration Trust Fund to finance maintenance of the roster system (App. 22). The roster is mainatined by the Association for signatory employers to the agreements irrespective of membership in the Association (App. 23). Thus there is a single skilled labor pool created and maintained for employers to draw on. The needs of each of these employers typically fluctuate dramatically and in many instances the lifespan of an employing company is limited to the production of a single motion picture or even a single television pilot episode. Employees consistently and constantly move from employer to employer based upon current employment opportunities and without any regard to whether or not the employer is a member of the Association.

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[2]The Industry Experience Roster provisions are contained in the "Seniority Provisions" of the agreement with Local 659 (App. 9-11) and are incorporated by reference in the Association and Independent Basic Agreements (App. 95).

There are many other provisions of the collective bargaining agreements which recognize the economic facts of life that the industry cannot operate without a single labor pool and that an artificial partitioning of the work force into a group consisting of those employees who momentarily happen to work for members of the Association and into hundreds of other little groups who equally momentarily happen to work for independent production companies would be wholly unrealistic. There is one central Health and Welfare Fund for active employees, one central Health and Welfare Fund for retired employees and one central Pension Fund (App. 22). The heretofore mentioned Contract Services Administration Trust Fund provides the means for the maintenance of industry-wide training programs and industry-wide safety procedures in addition to the Roster System (App. 22). Employees of members of the Association and of Independents alike, are covered by these plans and programs and the contributions of their employers are at the same rates (App. 22). In fact, the Board majority itself concluded that the "Association Basic Agreement" and the "Independent Basic Agreement" are "identical . . . in all essential respects, except for a different method of computing vacation and holiday pay", which takes into account the frequently short life span of the Independents (App. 95 and *id.* n. 3).

The Board decision, enforced by the Court of Appeals, did not outlaw the roster system as such. The Board acknowledged that giving preference in employment based on experience while working under a collective bargaining agreement containing the same seniority provisions was valid *but only so long as such preference is limited to employment within a single bargaining unit* (App. 65-66).

Thus, the decision of the Court of Appeals, enforcing the Board's order, would eliminate the industry-wide roster system and thereby effectively decimate the industry-wide labor pool which has served the industry well for almost a quarter of a century. Instead, under the present agreements, there would be one large roster for the members of the Association and, theoretically, hundreds of small and often tiny rosters for the Independents. Total chaos would result:

1. The Roster for Association members would have to be newly created out of the presently existing roster by deleting all time heretofore credited for work performed for employers who are not members of the Association. Numerous skilled craftsmen would no doubt lose their roster standing.

2. Many persons in the labor pool would be eligible for placement on more than one Independent roster. Each such placement would require a separate application, a separate interview by the qualifications committee and a separate physical examination. The cost of this process would be prohibitive. The administration of multiple roster systems covering thousands of employees working for hundreds of employers who are hired project-by-project and often day-by-day would be an impossible task. No Independent roster would be large enough to supply an adequate labor pool for the employer. No Independent would be able to supply sufficient employment opportunities for the persons on its roster.

3. A single roster based solely upon employment by members of the Association would also fail to provide a feasible alternative. Such a roster would necessarily be much smaller than the present one. It would not provide a sufficiently large pool to meet the needs

of the Association's members during periods of high demand, and employment opportunities for persons in the pool would not be sufficiently consistent and secure to prevent the dissipation of the pool by exit into other areas of employment.

An answer to the question presented for review by this Court is also important to the labor relations of other major industries. For instance, there can be no question that a determinative answer to this question, is required by the trucking industry.

Clauses commonly found in labor agreements in the trucking industry, provide that upon merger or consolidation of facilities under certain specified circumstances employees shall be given credit for seniority achieved while working under collective bargaining agreements. In *Whiting Milk, supra,* such a clause was interpreted by the parties to deny any seniority credit to those employees of White Brothers, who, prior to the purchase of its business, had not been covered by any collective bargaining agreement, while those former employees of White Brothers who had worked under collective bargaining agreements were credited with their prior seniority. The Court of Appeals for the First Circuit held, contrary to the Board, that this interpretation and application of the clause did not violate the Act. *N.L.R.B. v. Whiting Milk Corporation, supra.* In *Teamsters' Freight Local No. 480* (Hilton D. Wall), *supra,* the Board was again faced with the same interpretation of a very similar clause but under the National Master Freight Agreement as supplemented by the Southern

Conference Area Agreement covering employees in the trucking industry in the South. 167 NLRB at 921 n. 2, *supra*. The Board followed its own decision in *Whiting Milk* and again found a violation. The Court of Appeals for the Sixth Circuit enforced the Board's order without opinion. *N.L.R.B. v. Teamsters Local No. 480, supra.*

There can be no question that the Board equates the denial of seniority credit to employees in the trucking industry who have not worked under collective bargaining agreements with the denial of industry experience roster credit to employees in the motion picture and television industry who have not worked under collective bargaining agreements containing the same seniority industry experience roster provisions. *N.L.R.B. v. Teamsters' Freight Local No. 480, supra,* and its own decision in *Whiting Milk Corporation, supra,* were the only cases cited by the Board majority in support of its conclusion that the application of the roster provisions in this case violated the Act by

> "penal[izing] employees for having exercised their statutory right to refrain from bargaining collectively through Respondent in the past, while rewading those employees who have chosen to work in units represented by Respondent."[8] (App. 97).

"[8]See *Teamsters' Freight Local No. 480 (Hilton D. Wall)*, 167 NLRB 920, enfd. 409 F.2d 610 (C.A. 6); *Whiting Milk Corporation*, 145 NLRB, enforcement denied, 342 F.2d 8 (C.A. 1). *Although enforcement was denied in Whiting, we believe the rationale in Hilton D. Wall to be correct, and we respectfully disagree with the Court's rationale in Whiting.*" (App. 97) (emphasis added).

III.

The Decision of the Court of Appeals in This Case Is in Direct Conflict With the Decision of the Court of Appeals for the First Circuit in Whiting Milk.

We have already pointed out (Point II, *supra*) that the Board majority in this case clearly viewed its decision as in conflict with the Court decision in *Whiting Milk*. An analysis of the two cases fortifies this conclusion.

In the instant case, the Administrative Law Judge (then called "Trial Examiner") found that there was no requirement of union membership or of a union permit for placement on the roster or for treatment by the union as having roster status (App. 34). He stated that therefore the "hiring arrangement (or roster system) did not violate the Act unless there was specific evidence of preference because of union membership or other similar requirement" (App. 43). He found that there was no such evidence and that in the cases of Lapenieks and Colman, Local 659 had done nothing more than to apply the roster system (App. 62). Accordingly, he concluded that the Act had not been violated. (App. 88-89).[3] He found it therefore unnecessary to decide whether members of the Association and the Independents constitute a single multi-employer unit (App. 31).

The Board majority left the factual findings of the Administrative Law Judge undisturbed (App. 91 n.1)—*i.e.*, that the roster system and its application were free of any evidence of union membership or similar requirements. Nevertheless, it concluded that "initial em-

[3]Alternative grounds for the recommended order to dismiss the complaint are not discussed here because they are not relevant to the question presented.

ployment in a unit represented by Respondent is based strictly on union considerations" (App. 102). It characterized the ultimate issue and its resolution as follows:

> "The question here is not what seniority rights an employee acquires after working in a unit represented by Respondent, but what rights the applicant is to start with when he seeks employment with an employer who is party to a collective-bargaining agreement with Respondent and/or IATSE. Respondent admits that if an employee had acquired seniority rights under a collective-bargaining contract to which Respondent and/or IATSE is a party, those rights will be honored where the employee seeks employment in an entirely separate unit which is also represented by Respondent. On the other hand, an employee cannot commence work in a unit represented by Respondent unless he has previously worked in a unit covered by a collective-bargaining contract to which Respondent and/or IATSE is a party. *Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent.*" (App. 99). (Emphasis added).

The Board majority reasoned that such "union considerations" were permissible only within a single bargaining unit (App. 98) and, holding that the members of the Association and the Independents do not constitute a single bargaining unit (App. 97-98), that the

application of the roster system therefore coerced employees in the exercise of their statutory right to choose to be represented by a union or to refrain from doing so (App. 97), and thus violated Section 8(b)(1)(A) of the Act (App. 102). To emphasize: *the only "union consideration"* found by the Board majority was the requirement that work to be credited toward roster status had to be performed "under a collective-bargaining agreement containing the same seniority provisions as those contained herein" (App. 10). The Memorandum Opinion of the Court of Appeals, granting enforcement of the Board's order states:

> "A finding of a section 8(b)(1)(A) violation does not require actual proof of intent to influence the exercise of section 7 rights. The Board's inferences concerning the 'natural foreseeable consequences of the conduct' were adequately supported by the record." (App. 113).

It may therefore be safely assumed that the Court agreed with the Board's reasoning.

In *Whiting Milk*, as here, the sole basis for violation of the Act found by the Board was preference in employment based on prior employment under a collective-bargaining agreement in a different bargaining unit. Denying enforcement, the Court of Appeals for the First Circuit disposed of the issue as follows:

> "The long and short of this case is that the Union bargained for and obtained a benefit for employees in the units it represented. This is not illegal discrimination against employees *in other units* not represented by the Union but only a normal natural incident of union representation. Obtaining a benefit for employees may well en-

> courage others to join a union but that side effect does not violate the Act, for 'The truth is that the union is a service agency that probably encourages membership whenever it does its job well.' Local 357, International Brotherhood of Teamsters, etc. v. NLRB, 365 U.S. 667, 675-676, 81 S.Ct. 835, 840, 6 L.Ed. 2d 11 (1961). It follows that Clause 81 of the Milk Industry Agreement does not discriminate against any right possessed by the non-represented Hyannis employees of White Brothers in violation of §8(a)(1) or (3) or §8(b)(1)(A) or (2) of the Act." 342 F. 2d, at 11, *supra* (Emphasis added).

The conflict between the two decisions could not be clearer.[4]

IV.

The Decision of the Court of Appeals in This Case Is at Least Conceptually in Conflict With the Decision of the Court of Appeals for the Third Circuit in Rosen.

In *Nu-Car Carriers, Inc.*, 187 NLRB 850 (1971), the Board considered the validity of a teamster pension fund provision crediting employees with past service credits for work performed under any teamster contract prior to 1952. The Board dismissed the complaint. On review *sub nom., Rosen v. N.L.R.B., supra,* the Court of Appeals for the Third Circuit affirmed. The Court pointed out that there was no requirement that

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[4]We anticipate that it may be argued in opposition to the Petition that *Whiting Milk* is distinguishable because it involved retention of seniority rather than gaining initial employment (see App. 98-99). We respectfully submit that this is a distinction without a difference. An employee who loses his seniority rights is the first to be laid off.

the employee had to have been a union member (just as the Administrative Law Judge found in the instant case). It held that there was no illegal discrimination in favor of employees represented by the union since union and nonunion employees participated on an equal basis and concluded that the preference was nothing more than the natural consequence of union representation, referring to *Whiting Milk* (*Rosen v. N.L.R.B., supra,* 455 F.2d at 617-618).

Except for the difference in the nature of contractual benefits involved, the conflict between decisions is again direct and clear.

V.

Assuming That the Decisions of Other Courts of Appeal Were to Be Viewed as Not Conflicting With the Decision of the Court of Appeals in This Case, the Question Presented Is an Important One Which Has Not Been and Should Be Settled by This Court.

We have already pointed out *in extenso* the importance of the question presented (See Point II, *supra*). Petitioner argues eloquently in its brief that the Decision of the Court of Appeals in the instant case is in conflict with the decision of this Court in *Local 357, Teamsters v. N.L.R.B.*, 365 U.S. 667 (1961) (Pet. 20-24). Even if this were not so, at worst, clearly then, this Court has never decided the question presented. Though the Court below cites *Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 734 (1964) in support of its decision (App. 113) as a matter of fact, in *Lummus*, the same Court of Appeals based its finding of a violation upon "an incident keyed to union membership". The Court expressly stated there that it need not decide "whether a discrimination based entirely upon causes not related to

union membership or activity is violative of the statute." *Lummus Co. v. N.L.R.B., supra,* 339 F.2d at 733.

In *Whiting Milk, supra,* the Court remarked that it had not been cited to any cases even closely in point and that it had found none. *N.L.R.B. v. Whiting Milk Corporation, supra,* 342 F.2d at 10. If there is no conflict with the decision of this Court in *Local 357, Teamsters* and with the decision in *Whiting Milk,* then the Court of Appeals for the District of Columbia, in deciding the very issue which it reserved in *Lummus,* has rendered a decision of first impression. Due to the importance of the question in the Administration of the Act and, because of the vast impact of the decision on industries characterized by casual, transient employment in general, and on the motion picture and television industry in particular, this question should be settled by this Court.

Conclusion.

For all of the reasons stated in this brief, we respectfully urge that the Petition for a Writ of Certiorari as to the Second Question Presented for Review should be granted.

Respectfully submitted,

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